Feb 26, 2001

Supreme Court, U.S.
FILED
FEB 26 2001
CLERK

No. 00-767

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

ENRICO ST. CYR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the district court had habeas corpus jurisdiction over respondent's challenge to his final removal order.

2. Whether the Board of Immigration Appeals properly concluded that respondent is not eligible for discretionary relief from deportation under former 8 U.S.C. 1182(c) (1994) because his removal proceeding was commenced after the repeal of Section 1182(c) became effective, even though he pleaded guilty and was convicted before that date.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 229 F.3d 406. The opinion of the district court (Pet. App. 74a-91a) is reported at 64 F. Supp. 2d 47. The decisions of the Board of Immigration Appeals (Pet. App. 94a-95a) and the immigration judge (Pet. App. 96a-97a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2000. The petition for a writ of certiorari was filed on November 14, 2000, and was granted on January 12, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in the appendix to the petition for a writ of certiorari (Pet. App. 98a-114a) are pertinent provisions of

the Suspension of Habeas Corpus Clause of the United States Constitution, Article I, Section 9, Clause 2; Sections 1105a(a) and 1182(c) of Title 8, United States Code, as in effect before April 24, 1996; Sections 1105a(a) and 1182(c) of Title 8, as amended effective April 24, 1996; Sections 1225(b), 1229b(a), and 1252 of Title 8, as in effect beginning April 1, 1997; Sections 401(e) and 440 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Sections 304(b) and 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546; and Section 2241 of Title 28, United States Code.

STATEMENT

1. *Statutory Background.* This case concerns comprehensive amendments to the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, enacted by Congress in 1996. Those changes were designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by restricting and streamlining judicial review of their deportation orders. See generally H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 107-108, 120-123, 157-161 (1996). Two enactments are particularly pertinent: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546.

a. *Pre-AEDPA Law.* An alien convicted of an "aggravated felony" such as a drug trafficking crime is, and was before AEDPA, "deportable" from the United States. See 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999); 8 U.S.C. 1251(a)(2)(A)(iii) (1994); 8 U.S.C. 1101(a)(43)(B). Before AEDPA, the Attorney General was authorized to provide

discretionary relief from deportation to aliens lawfully admitted for permanent residence. See 8 U.S.C. 1182(c) (1994).[1] To be eligible for such relief, the alien had to show that he had maintained a lawful unrelinquished domicile in this country for seven years. The final sentence of Section 1182(c) provided, however, that that Section's first sentence, which conferred the discretionary authority on the Attorney General, "shall not apply" to an alien who had been convicted of an aggravated felony and had served a term of imprisonment of at least five years for such an offense. 8 U.S.C. 1182(c) (1994).

Under the INA as in effect before AEDPA, an alien could challenge a final deportation order, including the Attorney General's denial of discretionary relief from deportation under Section 1182(c), by filing a petition for review of his deportation order in the appropriate regional court of appeals. See 8 U.S.C. 1105a(a) (1994) (incorporating Hobbs Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341 *et seq.*); *Foti* v. *INS*, 375 U.S. 217 (1963). In addition, under certain circumstances an alien in custody pursuant to an order of deportation could seek judicial review thereof by filing a petition for a writ of habeas corpus in district court,

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[1] Section 1182(c) provided that "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General" without regard to certain grounds of exclusion. 8 U.S.C. 1182(c) (1994). Although Section 1182(c) by its terms applied only to permit the admission of certain lawful permanent resident aliens who would otherwise be excludable upon returning to the United States, the Second Circuit held in *Francis* v. *INS*, 532 F.2d 268 (1976), that deportable aliens who had not departed from the United States and who had seven years' unrelinquished domicile in this country also had to be given the opportunity to apply for relief from deportation under Section 1182(c). In the interest of national uniformity, the Attorney General acquiesced in that decision. See *In re Silva*, 16 I. & N. Dec. 26 (BIA 1976).

pursuant to 8 U.S.C. 1105a(a)(10) (1994). Similarly, 8 U.S.C. 1105a(b) (1994) permitted judicial review of exclusion orders by way of habeas corpus.

Those provisions for judicial review of deportation and exclusion orders had undergone extensive revision as Congress had sought to balance aliens' opportunities for judicial review with the need to avoid unwarranted delays in deportations. From 1917 to 1952, Congress made no express provision for judicial review of deportation and exclusion orders. This Court ruled that such orders could be reviewed by writ of habeas corpus, but only to the extent that judicial review was required by the Constitution. See *Heikkila* v. *Barber*, 345 U.S. 229, 233-234 (1953).

In the 1950s, however, this Court held that the enactment of the Administrative Procedure Act (APA) in 1946 and of the INA in 1952 had significantly altered the legal landscape, and that Congress had authorized the courts to review the merits of deportation and exclusion orders in actions for declaratory relief brought in district court under the APA. See *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955); *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956). In 1961, Congress reacted to those decisions by revising and streamlining the INA's provisions for judicial review. Congress's principal concern was that aliens had resorted "to repeated judicial reviews and appeals for the sole purpose of delaying their justified expulsion from this country." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 23 (1961). While Congress recognized that aliens should be entitled to challenge "the Government's findings of deportability through judicial process," *ibid.*, Congress's "fundamental purpose * * * was to abbreviate the process of judicial review of deportation orders" in order to prevent "forestalling departure by dilatory tactics in the courts." *Foti*, 375 U.S. at 224.

"The key feature of the congressional plan directed at this problem was the elimination of the previous initial step in

obtaining judicial review—a suit in a District Court—and the resulting restriction of review to Courts of Appeals." *Foti*, 375 U.S. at 225. To that end, Congress established a self-contained judicial-review provision in the INA, independent and exclusive of the APA. Congress directed that the Hobbs Act's provisions for review in the courts of appeals "shall apply to, and shall be the *sole and exclusive procedure for*, the judicial review of all final orders of deportation" under the INA, "except" for ten specific qualifications that adapted for immigration cases the Hobbs Act's general provisions with respect to time limits, venue, and other procedural matters. See 8 U.S.C. 1105a(a) (1994) (emphasis added); *Stone* v. *INS*, 514 U.S. 386, 393 (1995).

One of those express exceptions addressed habeas corpus. Congress was aware of the concern that a provision for exclusive review in the courts of appeals would divest the district courts of the authority they had previously exercised to review deportation orders by writ of habeas corpus for the benefit of aliens held in custody.[2] Congress therefore included, among the express exceptions to Section 1105a(a)'s incorporation of the Hobbs Act exclusive court-of-appeals review procedures, a provision that "any alien held in

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[2] For example, at an April 24, 1958, hearing of a subcommittee of the House Judiciary Committee examining the deportation of William Heikkila, Representative Hillings asked whether there is "a possibility that maybe legislatively we could have a procedure whereby all of the possible points of appeal could be consolidated in one case, and all would have to be asserted at one time, otherwise any possible remedy is waived." See No. 85-HJ-T.538, at 21 (Congressional Information Service) (lodged with the Clerk). Representative Walter, in response, expressed doubts that such a provision would be constitutional because it would deny aliens held in custody the opportunity for habeas corpus. *Id.* at 21-22; see also 104 Cong. Rec. 17,172 (1958) (remarks of Rep. Walter); 107 Cong. Rec. 12,177 (1961) (remarks of Rep. Walter); H.R. Rep. No. 2478, 85th Cong., 2d Sess. 6 (1958); H.R. Rep. No. 565, 87th Cong., 1st Sess. 15-16 (1961).

custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." 8 U.S.C. 1105a(a)(10) (1994). That provision, the committee report explained, "clearly specifie[d] that the right to habeas corpus [was] preserved to an alien in custody under a deportation order. In that fashion, [Congress] except[ed] habeas corpus from the language which elsewhere declare[d] that the procedure prescribed for judicial review in circuit courts shall be exclusive." H.R. Rep. No. 1086, *supra*, at 29.

b. *AEDPA.* In 1996, Congress twice restricted both the Attorney General's authority to grant discretionary relief from deportation to criminal aliens and the availability of judicial review of criminal aliens' deportation orders. First, on April 24, 1996, Congress enacted AEDPA into law. Section 440(d) of AEDPA amended the final sentence of Section 1182(c) to provide that the Attorney General's authority to grant relief under Section 1182(c) "shall not apply" to a broader class of aliens, including all aliens who were deportable because they had been convicted of aggravated felonies. See AEDPA § 440(d), 110 Stat. 1277 (referring to aliens deportable under 8 U.S.C. 1251(a)(2)(A)(iii) (1994) (now recodified as 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999))).

Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," repealed 8 U.S.C. 1105a(a)(10) (1994), which had specifically permitted aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court. See 110 Stat. 1268. AEDPA therefore left in place the exclusive court-of-appeals review provision that Congress had enacted in 1961, but eliminated the INA's previous express "preserv[ation]" (H.R. Rep. No. 1086, *supra*, at 29) of habeas corpus for aliens held in custody. At the same time, Section 440(a) of AEDPA enacted a new Section 1105a(a)(10) to provide, for the same classes of criminal aliens who had been rendered ineligible for relief under Section 1182(c), an exception to the general

availability of judicial review of deportation orders in the courts of appeals. AEDPA Section 440(a) provided that any final order of deportation against an alien who was deportable for having committed one of the disqualifying offenses, including aggravated felonies, "shall not be subject to review by any court." 110 Stat. 1276-1277.

On February 21, 1997, the Attorney General concluded in *In re Soriano*, Interim Dec. No. 3289, 1996 WL 426888, that the restriction enacted in AEDPA Section 440(d) on the Attorney General's authority to grant discretionary relief under 8 U.S.C. 1182(c) (1994) to aggravated felons applied to all deportation proceedings pending on or after the date of AEDPA's enactment, including those pending proceedings in which aliens had already submitted applications for relief. Numerous aliens challenged that conclusion in the federal courts, usually seeking to invoke the district courts' general habeas corpus jurisdiction under 28 U.S.C. 2241. The courts of appeals divided as to whether (as the government contended) AEDPA had deprived the district courts of habeas corpus jurisdiction to entertain such challenges to final deportation orders. The courts of appeals also reached varying conclusions about the temporal scope of AEDPA Section 440(d). See Pet. 4-5 & nn.3-5.

The government and several aliens filed certiorari petitions, asking this Court to decide whether the district courts retained habeas corpus jurisdiction after AEDPA to entertain challenges to deportation orders, and to resolve the temporal reach of AEDPA Section 440(d). By that time, however, Congress's intervening enactment of IIRIRA had once again recast the legal framework and had reduced the prospective importance of cases arising only under AEDPA. This Court denied the certiorari petitions that involved only the changes to the INA made by AEDPA, remitting to a

later date related issues in cases also involving IIRIRA. See Pet. 6.[3]

c. *IIRIRA.* On September 30, 1996, Congress enacted IIRIRA into law. In Section 304(a) of IIRIRA, Congress abolished the old distinction between "deportation" and "exclusion" orders,[4] and instituted a new form of proceeding, known as "removal." See 8 U.S.C. 1229, 1229a (Supp. V 1999); 110 Stat. 3009-587 to 3009-593.[5] An alien convicted of

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[3] In light of this Court's denial of certiorari in several cases involving the temporal scope of AEDPA Section 440(d) and the remaining conflict in the circuits on that issue, the Attorney General recently published a final rule that, while not conceding their correctness, acquiesced in the decisions of those circuits that concluded that AEDPA Section 440(d) does not bar the Attorney General from granting relief under Section 1182(c) to an alien who had been placed in deportation proceedings before AEDPA was enacted. See 66 Fed. Reg. 6436, 6438 (2001) (promulgating new 8 C.F.R. 3.44). Absent adverse circuit precedent, however, the Attorney General will continue to follow AEDPA Section 440(d)'s restriction on his authority to grant relief under Section 1182(c) in the cases of aliens who were placed in deportation proceedings after AEDPA was enacted, even if they were convicted before its enactment. See *id.* at 6443-6444.

[4] IIRIRA also expressly repealed the old INA provisions setting forth separate procedures for exclusion and deportation of aliens. See IIRIRA § 303(a), 110 Stat. 3009-585 (amending old 8 U.S.C. 1226), and § 308(b)(6), 110 Stat. 3009-615 (striking old 8 U.S.C. 1252b).

[5] Congress also enacted special forms of removal proceedings for aliens arriving in the United States without valid documentation, see 8 U.S.C. 1225(b)(1) (Supp. V 1999), and for aliens not admitted for lawful permanent residence who are convicted of aggravated felonies, see 8 U.S.C. 1228(b) (Supp. V 1999). Congress expressly provided for limited habeas corpus review in the district courts of immigration officers' expedited-removal decisions under Section 1225(b)(1). See 8 U.S.C. 1252(e)(2) (Supp. V 1999). For aliens found subject to removal in Section 1228(b) proceedings, Congress provided a modified version of the general court of appeals judicial-review procedures of 8 U.S.C. 1252 (Supp. V 1999) (discussed at pp. 10-11, *infra*), with shortened time limits. See 8 U.S.C. 1228(b)(3) (Supp. V 1999).

an aggravated felony is subject to removal. See 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999).

Section 304 of IIRIRA also refashioned the terms on which an alien found to be subject to removal may apply for relief in the discretion of the Attorney General. Congress completely repealed old Section 1182(c). See IIRIRA § 304(b), 110 Stat. 3009-597 ("Section 212(c) (8 U.S.C. 1182(c)) is repealed."). In its stead, Congress created a new form of discretionary relief, known as "cancellation of removal," with new eligibility terms. See 8 U.S.C. 1229b (Supp. V 1999); IIRIRA § 304(a), 110 Stat. 3009-594 to 3009-596. As under Section 1182(c) as amended by AEDPA, however, Congress provided that the Attorney General may not grant discretionary relief to aliens convicted of an aggravated felony. 8 U.S.C. 1229b(a)(3), 1229b(b)(1)(C) (Supp. V 1999).

Because IIRIRA made sweeping changes to the system for removal of aliens, Congress delayed IIRIRA's full effective date and established various transition rules. As a general matter, Congress provided that most of IIRIRA's provisions, including the new removal procedures and the repeal of Section 1182(c) along with its replacement by the new provisions for cancellation of removal—all of which were enacted together in Section 304 of IIRIRA—would take effect on April 1, 1997. See IIRIRA § 309(a), 110 Stat. 3009-625. For aliens who were placed in old deportation or exclusion proceedings before April 1, 1997, Congress expressly provided that most of IIRIRA's amendments would not apply, and that such cases instead would generally be governed by the pre-IIRIRA provisions of the INA (as amended by AEDPA) as well as transitional rules further restricting judicial review of criminal aliens' deportation orders. See IIRIRA § 309(c), 110 Stat. 3009-625, as amended

by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2(2), 110 Stat. 3657 (technical correction).[6]

Congress recast and streamlined the INA's provisions for judicial review of removal orders in Section 306 of IIRIRA. For removal proceedings commenced after April 1, 1997, Congress repealed altogether the former judicial-review provisions of 8 U.S.C. 1105a (1994), which, before AEDPA, had (at subsection (a)(10)) expressly made the writ of habeas corpus available to aliens held in custody. IIRIRA § 306(b), 110 Stat. 3009-612; see pp. 5-6, *supra*. In its place, Congress enacted the new 8 U.S.C. 1252 (Supp. V 1999), which provides that final orders of removal are subject to judicial review only on petition for review in the courts of appeals. See 8 U.S.C. 1252(a)(1) (Supp. V 1999) (incorporating Hobbs Act). Congress enacted no general exception to that provision for exclusive review of removal orders in the courts of appeals to allow aliens held in custody under a final order of removal to seek habeas corpus relief, as it had done in the INA before AEDPA repealed 8 U.S.C. 1105a(a)(10) (1994). Instead, Congress included, at 8 U.S.C. 1252(e)(2) (Supp. V 1999), only a much narrower exception that permits a limited form of habeas corpus review for aliens arriving at the border without valid documentation who were placed in expedited-removal proceedings under 8 U.S.C. 1225(b)(1) (Supp. V 1999).

Congress also specifically restricted judicial review of removal orders entered against criminal aliens by providing

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[6] Congress also provided in IIRIRA that aliens subject to exclusion orders in the transition period would no longer have access to the provision of Section 1105a(b) formerly allowing judicial review of their exclusion orders by habeas corpus (see p. 4, *supra*). Instead, Congress provided that "the action for judicial review" of exclusion orders would be governed by the general provisions, including the transition rules, for judicial review of deportation orders in the courts of appeals under Section 1105a(a). See IIRIRA § 309(c)(4)(A), 110 Stat. 3009-626.

that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" one of various criminal offenses, including aggravated felonies. See 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999). And Congress enacted a new, sweeping jurisdiction-limiting provision, 8 U.S.C. 1252(b)(9) (Supp. V 1999), which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section [*i.e.*, Section 1252].

2. *Proceedings Below.*

a. Respondent is a native and citizen of Haiti who was admitted to the United States as a lawful permanent resident on June 17, 1986. Pet. App. 2a. On March 8, 1996, before the enactment of AEDPA and IIRIRA, respondent pleaded guilty to, and was convicted in Connecticut state court for, the sale of a controlled substance, in violation of Conn. Gen. Stat. Ann. § 21a-277(a) (West 1994). Pet. App. 3a. Under the INA, that offense was an aggravated felony. See 8 U.S.C. 1101(a)(43)(B). At the time of respondent's conviction, which was entered before AEDPA amended Section 1182(c) to bar discretionary relief for all aggravated felons, the Attorney General would not have been barred from granting him discretionary relief from deportation under 8 U.S.C. 1182(c) (1994).[7]

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[7] Respondent was sentenced for that drug-trafficking offense to ten years' imprisonment, with execution suspended after five years. See Certified Administrative Record 35. We are informed that, at the time respondent was sentenced, he was already serving a separate term of

In 1997, after IIRIRA took effect, the Immigration and Naturalization Service (INS) commenced removal proceedings against respondent, charging him with removability based on his drug offense. See Pet. App. 77a. At his hearing before an immigration judge (IJ), respondent sought to apply for relief from deportation under former 8 U.S.C. 1182(c) (1994), which had been repealed as of April 1, 1997 (see p. 9, *supra*). The IJ denied that application and ordered respondent removed. Pet. App. 96a-97a. The Board of Immigration Appeals (BIA) affirmed, concluding that respondent was not eligible for Section 1182(c) relief because that form of relief "is not available in removal proceedings, which the respondent is properly in." *Id.* at 95a.

b. Respondent then filed a petition for a writ of habeas corpus in district court. Respondent contended that, even though the INS had placed him in *removal* proceedings

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imprisonment, which had commenced on August 8, 1995, for another drug-trafficking crime in violation of Conn. Gen. Stat. Ann. § 21a-277(a) (West 1994). Respondent's term of imprisonment for the conviction that formed the basis of his charge of removability was made consecutive to his earlier term and actually commenced on July 3, 1997. On May 13, 1999, respondent was released by state authorities on parole and was transferred to INS custody.

At the time of respondent's conviction, Section 1182(c) barred relief for aliens who had served, for an aggravated felony or aggravated felonies, "a term of imprisonment of at least 5 years." 8 U.S.C. 1182(c) (1994). That bar by its express terms operated to bar relief only when the alien had actually served five years in prison (not including parole time or time in INS detention) for aggravated felony offenses, and not when the alien was merely subject to a potential prison term of five years or more. Respondent has not actually served five years in prison for his drug-trafficking offenses. Accordingly, he would not have been barred from obtaining relief under Section 1182(c), as in effect when he was convicted in March 1996, merely by the length of his prison term. In AEDPA Section 440(d), which was enacted on April 24, 1996, Congress amended Section 1182(c) to render it inapplicable to *all* aggravated felons, regardless of the length of the sentence they served. See pp. 6-7, *supra*.

under the new provisions of IIRIRA (the propriety of which he did not challenge), he remained eligible to be considered for discretionary relief from *deportation* under old Section 1182(c). The government argued that the district court lacked habeas corpus jurisdiction to review the final order of removal, and in the alternative defended on the merits the BIA's decision holding respondent ineligible for relief under former Section 1182(c). The district court held that it had jurisdiction, ruled against the government on the merits, and granted habeas corpus, directing the BIA to entertain respondent's application for relief under former Section 1182(c). Pet. App. 74a-91a.

c. The court of appeals affirmed. Pet. App. 1a-39a.

(i) The court first concluded (Pet. App. 5a-6a), based on its decision the same day in *Calcano-Martinez* v. *INS*, 232 F.3d 328 (2d Cir. 2000), cert. granted, 121 S. Ct. 849 (2001) (see Pet. App. 40a-73a), that the district court properly exercised jurisdiction over respondent's habeas corpus petition. As in *Calcano*, the court held that IIRIRA did not "divest [the district] courts of their habeas jurisdiction under 28 U.S.C. § 2241 to review statutory and constitutional challenges to final removal orders when no other avenue for judicial review is available." Pet. App. 6a. Here, the court continued, no other avenue of judicial review is available because respondent had been convicted of an aggravated felony and was therefore barred by 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999) from raising his claims by petition for review in the court of appeals. Pet. App. 6a; see *id.* at 48a-73a (related holding in *Calcano*).

(ii) On the merits, the court held that the repeal of Section 1182(c) by IIRIRA Section 304 could not be applied to an alien who pleaded guilty or nolo contendere to an aggravated felony before IIRIRA's enactment. Pet. App. 6a-32a.

The court first concluded that Congress had not made clear whether the repeal of Section 1182(c) by IIRIRA Section 304 was to be applied to aliens who were convicted before Section 304's effective date. Pet. App. 14a-22a. It rejected the government's argument that, under the express general "effective date" provision in IIRIRA Section 309(a), 110 Stat. 3009-625, all of the new rules added by Sections 301-308 of IIRIRA, including IIRIRA Section 304's repeal of Section 1182(c) and its substitution of cancellation of removal, must be applied together to aliens placed in removal proceedings on or after April 1, 1997. See Pet. App. 16a.

The court further concluded that applying IIRIRA Section 304's repeal of Section 1182(c) in the cases of aliens who pleaded guilty before IIRIRA was enacted would have "an impermissible retroactive effect." Pet. App. 25a. Focusing on "the decision to enter a guilty plea to a crime * * * that qualifies the alien for removal under the immigration laws," the court agreed with respondent that "an alien charged with a crime making him eligible for deportation would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial," including "the availability of discretionary relief from removal." *Id.* at 26a-27a (brackets and internal quotation marks omitted). Because IIRIRA's repeal of Section 1182(c), in the court's view, would "upset settled expectations were it applied retroactively to pre-enactment guilty pleas [and] * * * would attach new legal consequences to [an alien's] guilty plea to a removal crime," it would "have an impermissible retroactive effect" in such cases. *Ibid.*[8]

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[8] Although the court did not hold that such application would be unconstitutional, it did invoke a perceived need to avoid placing IIRIRA Section 304 in constitutional doubt. Pet. App. 22a n.6. The court acknowledged that the Due Process Clause of the Fifth Amendment places only "a narrow limit on Congress's power" to enact retrospective legislation, but, it stated, retroactive application of IIRIRA Section 304 would raise a

(iii) Judge Walker dissented from the court's ruling on the merits. Pet. App. 33a-39a. Stressing IIRIRA's "comprehensive method of implementation" and Congress's intent that IIRIRA be "a complete break from the past," he concluded that "Congress intended the whole of IIRIRA's permanent provisions to apply to every alien as of April 1, 1997." *Id.* at 34a-35a. He also concluded that applying IIRIRA's repeal of Section 1182(c) to respondent's case would not conflict with the presumption against retroactivity because Section 304 "is not made retroactive merely because it applies to convictions for aggravated felonies before that time. The past aggravated felony conviction is only the prerequisite for the prospective denial of discretionary relief." *Id.* at 39a. And Judge Walker also stated (*ibid.*) that, even if the temporal scope of Section 304 were ambiguous, he would defer to the BIA's construction of it under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

SUMMARY OF ARGUMENT

I. A. The court of appeals erred in concluding that the district court had authority to review respondent's challenge to his removal order by habeas corpus. That conclusion is contrary to Congress's unmistakable design of the judicial-review provisions of the INA, which is to channel all challenges to removal orders into the courts of appeals (subject to a narrow express exception not implicated in this case). The court of appeals' jurisdictional ruling cannot be reconciled with the streamlined legislative scheme for judicial review of removal orders that Congress has enacted. It also ignores the history underlying congressional efforts to mini-

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"profound constitutional question." *Ibid.* The court remarked that "[t]he Constitution's safeguard against retroactivity is especially appropriate where it protects an unpopular group or individual" (presumably referring to aliens). *Ibid.*

mize judicial involvement in removal proceedings, including Congress's repeal of a provision of the INA that had previously preserved district court review by habeas corpus of deportation orders for aliens actually held in custody. And the jurisdictional ruling threatens to cause significant delays in the removal of criminal aliens from the United States, despite Congress's manifest desire that removal of criminal aliens be expedited. The decision finds no support in this Court's decisions to the effect that implied repeal of habeas corpus jurisdiction is disfavored, since Congress's divestment of the district courts' authority was express, not implied.

B. The court of appeals further erred insofar as it invoked the concern that, because respondent is barred by another provision of the INA from presenting his claim to the court of appeals, the resulting complete denial of a judicial forum for that claim might constitute an unconstitutional suspension of habeas corpus. The Constitution does not require a judicial forum for respondent's particular non-constitutional claim that he has a right to be considered for discretionary relief from deportation under the law as it existed before Congress amended the INA in 1996. The Court has repeatedly explained that discretionary relief from deportation is a matter of grace and not of right. The Court's immigration decisions arising on habeas corpus also give no indication that this kind of claim is within the constitutional core of the Great Writ. Indeed, Congress has authorized judicial review, even for aggravated felons, of the kinds of claims that the Court has in the past indicated must be made subject to judicial review. And even if the Constitution does require that a forum be available for the kind of claim raised by respondent, that forum should be the court of appeals, given Congress's overarching design of the INA's judicial-review provisions.

II. A. The court of appeals erred in concluding on the merits that an alien who pleaded guilty to an aggravated felony before AEDPA and IIRIRA were enacted but was placed in removal proceedings after IIRIRA's effective date of April 1, 1997, may nonetheless obtain relief from deportation under old 8 U.S.C. 1182(c) (1994), which was repealed by IIRIRA. That decision finds no support in this Court's retroactivity jurisprudence. Congress has expressly provided the temporal scope of IIRIRA's repeal of old Section 1182(c), directing that Section 1182(c) have no application in any removal proceeding commenced after April 1, 1997, regardless of the date of the alien's offense, plea, or conviction. That conclusion is compelled by the structure and design of IIRIRA, which as of April 1, 1997, makes a clear break with the deportation and exclusion proceedings of pre-IIRIRA law and replaces those proceedings with a comprehensive new framework.

B. Given Congress's clear intent that Section 1182(c) should have no application in removal proceedings under IIRIRA, it is unnecessary to consider whether that repeal would have a "retroactive" effect that might implicate the presumption against retroactive application of federal statutes. The court of appeals erred, however, insofar as it concluded that the repeal of Section 1182(c) would have an impermissible retroactive effect in cases like this one. Matters affecting the deportability and relief from deportation of aliens are inherently prospective in nature, and therefore legislative changes in the conditions on which aliens may or may not remain in this country do not implicate any presumption against retroactivity. Nor, since aliens have no right to discretionary relief from deportation, does application of IIRIRA's repeal of Section 1182(c) impair any vested rights. The presumption against retroactivity in any event lends no support to the court of appeals' focus on the class of aliens who pleaded guilty, a group that is not

mentioned in the INA, either before or after its amendment by IIRIRA. Finally, even if the temporal scope of IIRIRA's repeal of Section 1182(c) is not clear, the court of appeals should have deferred to the Attorney General's reasonable conclusion that that repeal should apply to all removal proceedings commenced after April 1, 1997.

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION TO REVIEW THE MERITS OF RESPONDENT'S CHALLENGE TO THE FINAL ORDER OF REMOVAL ENTERED AGAINST HIM

A. Congress Has Expressly Provided That Judicial Review Of Final Orders Of Removal Is Available Only On Petition For Review In The Court Of Appeals

The court of appeals ruled in this case, based on its jurisdictional holding in *Calcano-Martinez* v. *INS*, 232 F.3d 328 (2d Cir. 2000), cert. granted, 121 S. Ct. 849 (2001) (see Pet. App. 40a-73a), that a criminal alien (like respondent) who is precluded from obtaining judicial review of his removal order in the court of appeals because of 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999) may nonetheless obtain such review by filing a petition for a writ of habeas corpus in district court under 28 U.S.C. 2241. Pet. App. 6a. That conclusion is incorrect.[9]

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[9] This Court also granted the alien's petition for a writ of certiorari in *Calcano* to consider the related issue whether a court of appeals has jurisdiction, notwithstanding Section 1252(a)(2)(C), to entertain the same challenge to the Attorney General's denial of relief under the former Section 1182(c). Oral argument in both cases has been scheduled for April 24, 2001. Because *Calcano* concerns only the jurisdictional issue whereas this case also presents a challenge to the court of appeals' ruling on the merits, we intend to address the jurisdictional issue further in our brief for the respondent in *Calcano*.

1. The court of appeals' jurisdictional ruling is fundamentally inconsistent with the basic framework for judicial review of removal orders. Since 1961, Congress has consistently prescribed a general requirement that, to prevent delays in deportations, such review must proceed in the courts of appeals. *Foti* v. *INS*, 375 U.S. 217, 224-25 (1963). In enacting Section 1105a in 1961, Congress carved out an express exception to that general rule that allowed aliens actually held in custody under a final order of deportation to obtain judicial review thereof by habeas corpus. See 8 U.S.C. 1105a(a)(10) (1994). But Congress specifically repealed that exception in Section 401(e) of AEDPA, which is entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS." 110 Stat. 1268. Congress had enacted old Section 1105a(a)(10)'s express exception to preserve access to habeas corpus for aliens held in custody, recognizing that without such an exception, the self-contained provision in Section 1105a(a) for exclusive review of deportation orders in the courts of appeals under the Hobbs Act would eliminate the district courts' authority to review deportation orders by habeas corpus. See pp. 5-6, *supra*. Thus, when Congress repealed Section 1105a(a)(10) in AEDPA, it divested the district courts of the limited authority they had exercised since the 1961 amendments to review the merits of deportation orders, and made the courts of appeals the exclusive forum for all challenges to deportation orders.

When it enacted the new Section 1252 in IIRIRA, Congress reconfirmed that all judicial review of removal orders must be had in the courts of appeals. Section 1252(a)(1) provides that "[j]udicial review of a final order of removal * * * is governed only by" the Hobbs Act, which channels review of agency orders exclusively into the courts of appeals. See 28 U.S.C. 2341 *et seq.* Congress did not provide any general exception to that exclusive court-of-appeals review provision to allow habeas corpus review at the behest

of aliens held in custody, as it had provided in 1961. Congress did, however, include in Section 1252(a)(1) a narrower exception to the general requirement of exclusive review in the courts of appeals, which is applicable by its terms only to "an order of removal without a hearing pursuant to" 8 U.S.C. 1225(b)(1) (Supp. V 1999). For cases covered by that exception (aliens at the border without documentation who are placed in expedited-removal proceedings), Section 1252(e)(2) provides that "[j]udicial review of any determination made under [Section 1225(b)(1)] is available in habeas corpus proceedings." Thus, when Congress wished to provide for judicial review of final removal orders in habeas corpus proceedings in district court, it expressly so provided in Section 1252 itself, and its omission of any provision for habeas corpus review of any other kind of removal order means that such review is barred. Compare *United States* v. *Fausto*, 484 U.S. 439, 448-449 (1988); *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).

Furthermore, to ensure that the specified procedures for judicial review in Section 1252 would not be circumvented, Congress enacted Section 1252(b)(9), which provides sweepingly: "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section [*i.e.*, Section 1252 itself]." Section 1252(b)(9) confirms that, except for the narrow circumstance expressly mentioned in Section 1252(a)(1) where Congress permitted habeas corpus review (see p. 10, *supra*), the court-of-appeals review procedures of Section 1252 are the exclusive ones available to aliens seeking to challenge their removal orders. Indeed, this Court described Section 1252(b)(9) in *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483 (1999)

(*AADC*), as an "unmistakable 'zipper' clause" that channels judicial review to the courts of appeals. See *id.* at 482 (describing a "zipper" clause as one that says "no judicial review in [removal] cases unless [Section 1252] provides judicial review").

Finally, Congress also restricted, to a considerable degree, judicial review of criminal aliens' removal orders. Section 1252(a)(2)(C) provides that "[n]otwithstanding any other provision of law"—broad language not limited to Section 1252 or even to the INA—"no court shall have jurisdiction to review any final order of removal against" an aggravated felon. The court of appeals' ruling that respondent could obtain review in the district court of his challenge to the final order of removal against him is flatly inconsistent with that ban.

These consistent and successive enactments show that Congress has required that judicial review of deportation orders be had, if at all, only in the courts of appeals, except where Congress has expressly provided otherwise in the governing judicial-review provision of the INA itself. There is no such exception allowing respondent to obtain judicial review of his removal order in habeas corpus proceedings—and indeed Congress, even before it enacted IIRIRA, had repealed the prior provision for habeas corpus review in order to expedite judicial review of deportation orders. Yet the court of appeals' decision leads to the anomalous result that *criminal* aliens may proceed in district courts to test the validity of their removal orders, whereas all other aliens must file petitions for review in the court of appeals, pursuant to the traditional exclusive-review procedures. That result turns Congress's scheme on its head. Given Congress's overarching intent in AEDPA and IIRIRA to expedite the removal of criminal aliens (see p. 2, *supra*), it is inconceivable that Congress would have intended criminal aliens to have *greater* opportunities for judicial review (and

delay) of their removal orders than all other aliens. Cf. *Foti*, 375 U.S. at 224 (noting Congress's concern with delays in judicial review of removal orders); *Stone*, 514 U.S. at 399 (similar).[10] Indeed, the court of appeals acknowledged in *Calcano* (Pet. App. 72a) that the government's reading of the INA would "eradicate habeas corpus's duplicative review of legal questions in the district court and the court of appeals and serve Congress's goal to streamline judicial review."[11]

2. The court of appeals nevertheless concluded that Congress had not acted with sufficient clarity to divest the district courts of their authority to review the merits of removal orders by habeas corpus. Invoking *Felker* v. *Turpin*,

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[10] As Congress was aware in both 1961 and 1996, aliens proceeding in district court pursuant to 28 U.S.C. 2241 have markedly greater opportunities for delay than those proceeding directly in the courts of appeals. Section 2241 contains no express time limit on the filing of a petition for a writ of habeas corpus, in contrast with the strict time limits governing the exclusive-review procedures of the INA, see 8 U.S.C. 1252(b)(1) (Supp. V 1999). Also, unlike the INA, Section 2241 does not require consolidation of challenges to deportation orders with challenges to motions to reopen or reconsider. Cf. 8 U.S.C. 1252(b)(6) (Supp. V 1999); *Stone*, 514 U.S. at 393-394. And, of course, an alien who is unsuccessful in district court can appeal to the court of appeals, and thereby obtain further delay.

[11] Accord *Henderson* v. *INS*, 157 F.3d 106, 119 n.9 (2d Cir. 1998) ("Congress clearly meant to streamline judicial review, and it seems perverse to find that the new laws actually *added* a layer of review in the district courts that did not generally exist before."), cert. denied, 526 U.S. 1004 (1999); *LaGuerre* v. *Reno*, 164 F.3d 1035, 1039 (7th Cir. 1998) (rejecting aliens' contention that merits of deportation orders could be reviewed on habeas corpus after AEDPA because, under that construction, "then Congress accomplished nothing toward its aim of curtailing judicial review," and "[m]aybe less than nothing, if by closing the door to review by the courts of appeals Congress simultaneously opened the door to review by the district courts *followed* by review by the courts of appeals"), cert. denied, 528 U.S. 1153 (2000).

518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868), for the proposition that implied repeals of habeas corpus jurisdiction are not favored, the court stated in *Calcano* that it could not "presume" that Congress had divested district courts of their authority to review removal orders given that Congress had not "explicitly mention[ed] the jurisdictional statute [28 U.S.C. 2241] or the general type of jurisdiction by name." Pet. App. 61a; see *id.* at 62a-63a (stressing that IIRIRA "do[es] not explicitly mention a repeal of a federal court's general habeas jurisdiction or 28 U.S.C. § 2241"). That reasoning is fundamentally flawed.

In the first place, the court erred in its premise that Section 1252 does not mention habeas corpus ("the general type of jurisdiction") by name. Section 1252(e)(2) expressly permits a narrow form of judicial review by "habeas corpus" in expedited-removal proceedings under Section 1225(b)(1), and Section 1252(a)—which prescribes the general rule that judicial review is exclusively to be had in the courts of appeals—specifically refers to that exception. See pp. 8 n.5, 10, *supra*.

In any event, this case does not involve an implied repeal of the district courts' authority to review removal orders, but rather an express withdrawal.[12] The overwhelming conclusion that must be drawn from AEDPA and IIRIRA is that a district court may no longer review by habeas corpus the Attorney General's legal conclusions that underlie a

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[12] Moreover, Congress has not eliminated all authority in the district court to ensure that the removal of an alien is lawful. If, for example, an alien contended that no removal order had ever been entered against him and that the INS's efforts to remove him were therefore without warrant, a district court would have jurisdiction under 28 U.S.C. 2241 to entertain such a contention. Such a challenge would not fall within the scope of the exclusive-review provisions of Section 1252(a), which refer only to review of removal orders, and the district court would retain authority to ensure that the INS's intended removal of the alien was based on such an order.

determination, in a removal order, that a particular alien is subject to removal. In AEDPA Section 401(e)—a provision entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS"—Congress expressly repealed the INA's prior exception for habeas corpus review in former 8 U.S.C. 1105a(a)(10) (1994). See p. 6, *supra*. And the exclusive, self-contained structure of judicial review under Section 1252 enacted by IIRIRA—requiring that judicial review of removal orders be governed "only" by the Hobbs Act's procedures for judicial review in the courts of appeals (§ 1252(a)(1)); dictating that judicial review of all legal and factual issues arising in removal proceedings be had "only" under Section 1252 itself (§ 1252(b)(9)); creating an express but very narrow provision for habeas corpus proceedings in limited circumstances inapplicable here (§ 1252(a)(1) and § 1252(e)(2)); and precluding judicial review of aggravated felons' removal orders "[n]otwithstanding any other provision of law" (§ 1252(a)(2)(C))—demonstrates that a removal order such as that entered against respondent may be challenged, if at all, only in the courts of appeals under Section 1252, and not in the district courts under Section 2241.

Neither *Felker* nor *Yerger* holds or even suggests that a statutory provision that categorically bars *all* forms of judicial review other than that expressly provided for is ineffective to bar review on habeas corpus, and that the only way in which Congress can divest the district courts of authority under Section 2241 is by referring to that specific statute or by using the words "habeas corpus" in an enactment. In both *Felker* and *Yerger*, the statute in question simply did not apply at all to this Court's habeas corpus jurisdiction, either explicitly or in categorical terms that necessarily included that jurisdiction. See *Felker*, 518 U.S. at 658-662. Where, as here, there is such a categorical bar, a specific reference to habeas corpus or the statute governing habeas corpus in the district courts is unnecessary and

indeed would be redundant. Compare *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 435-438 (1989). Because Congress's intent is clear that another statutory scheme provides the exclusive means by which an alien's removal order may be tested, the courts must give effect to that determination and may not invoke their habeas corpus jurisdiction. See *Swain* v. *Pressley*, 430 U.S. 372, 378 (1977).

The court of appeals also reasoned that Section 1252 does not "expressly" supplant district court review of removal orders on habeas corpus because "judicial review" (which Section 1252 plainly does restrict) has long been understood as distinct from "habeas corpus." Thus, it concluded, IIRIRA's restriction of "judicial review" of removal orders to the courts of appeals should not be read to include habeas corpus review. The sharp line the court of appeals perceived between "judicial review" and "habeas corpus" in the immigration context simply does not exist, however. Congress has long used the term "judicial review" to refer to proceedings for review of the merits of deportation, exclusion, and removal orders in district court by habeas corpus, when it deemed such review to be appropriate.

Thus, when Congress in 1961 acted to preserve habeas corpus review for aliens held in custody, it provided that "any alien held in custody pursuant to an order of deportation may obtain *judicial review* thereof by habeas corpus proceedings." 8 U.S.C. 1105a(a)(10) (1994) (emphasis added). And Congress showed that its choice of language was not accidental in old Section 1105a(b), also enacted in 1961, which provided the judicial-review scheme for final exclusion orders: "Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter * * * may obtain *judicial review* of such order by habeas corpus proceedings and not

otherwise." 8 U.S.C. 1105a(b) (1994) (emphasis added).[13] In IIRIRA, Congress again used "judicial review" to refer to review of the merits of a removal order by habeas corpus in district court. For certain expedited-removal orders against aliens at the border—*i.e.*, "orders of removal without a hearing pursuant to [Section 1225(b)(1)]"—Congress provided that "*[j]udicial review* * * * is available in habeas corpus proceedings." 8 U.S.C. 1252(e)(2) (Supp. V 1999) (emphasis added). Thus, the court of appeals was wrong to conclude that Congress's exclusive placement of "judicial review" of removal orders in the courts of appeals was irrelevant to the question whether the district courts retain authority to review such orders by habeas corpus.

Finally, even if the general self-contained scheme enacted by Congress in Section 1252 did not make it sufficiently clear that Congress had eliminated review of removal orders in the district courts, Section 1252(a)(2)(C) unmistakably requires the conclusion that an aggravated felon like respondent cannot obtain such review in district court. Under that provision, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal" against an aggravated felon. Two points are salient about Section 1252(a)(2)(C). First, it states that "no court" shall have such jurisdiction, not just that the courts of appeals shall have no such authority. It thus expressly bars the district courts as well as the courts of appeals from reviewing respondent's claim. Second, it bars the courts from exercising "review"—not merely "judicial review"—of

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[13] When Congress rendered 8 U.S.C. 1105a(b) (1994) inapplicable to transition cases under IIRIRA in 1996, it provided that "the action for judicial review" of exclusion orders would be governed by the general provisions for judicial review of deportation orders in Section 1105a(a)—thus confirming its understanding that "judicial review" of an exclusion order, when had in the district court, had previously been by habeas corpus. See IIRIRA § 309(c)(4)(A), 110 Stat. 3009-626.

removal orders against aggravated felons. Congress's sweeping language requires the conclusion that a criminal alien barred from obtaining review of a challenge to his removal order in the court of appeals may not obtain the very same review in district court.

B. Congress's Withdrawal Of District Courts' Authority To Review Removal Orders Does Not Raise Constitutional Concerns About Suspension Of Habeas Corpus

The court of appeals based its jurisdictional ruling in part on a perceived need to avoid a "serious constitutional question" that would supposedly arise under the Suspension Clause (U.S. Const. Art. I, § 9, Cl. 2) if no court had authority to consider respondent's particular non-constitutional "retroactivity" challenge to his removal order. See Pet. App. 68a. As we have noted (pp. 13, 18, *supra*), the court of appeals concluded in *Calcano* that it could not review the same kind of claim on an alien's direct petition for review. Although we agree with the court of appeals that Section 1252(a)(2)(C) barred it from entertaining respondent's claim by petition for review, we do not agree that the fact that respondent may have no judicial forum for the particular non-constitutional claim raised in this case raises constitutional concerns. The Suspension Clause does not require a judicial forum for the claim that the Attorney General has the discretionary authority to decline to remove an alien who is concededly subject to removal under the INA.

This Court has never ruled that the Great Writ requires a judicial forum for an alien to present the claim that he has a "right" to be considered for an exercise of a power that Congress has placed in the discretion of the Attorney General to dispense with the deportation of an alien. To the contrary, the Court has described the Attorney General's discretionary power to grant a dispensation from deportation as "an

act of grace" accorded to his "unfettered discretion," similar to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996); see also *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956); *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950) (L. Hand, J.). Furthermore, even if Section 1182(c) were still theoretically applicable in cases like respondent's, there is no question that the Attorney General would have had the authority, in light of Congress's enactment of IIRIRA proscribing for the future the grant of discretionary relief to aggravated felons, to decide as a matter of policy that all aliens who had been convicted of aggravated felonies should not receive relief under former Section 1182(c). See *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 78-79 (1957) (holding that, in denying discretionary relief from deportation, BIA could take into account policies enacted in the INA in 1952, even though proceeding was technically controlled by Immigration Act of 1917).

Thus, the particular claim raised in this case is well removed from the kinds of claims that this Court has indicated in the past had to be made subject to judicial review by habeas corpus when that was the only avenue for judicial review of deportation orders. While the Court has not provided an exhaustive elucidation of the kinds of claims that fall within the core of the Great Writ, it has provided important insights into the nature of the writ in decisions involving the immigration laws before 1952, when that was the only available form of judicial review of deportation orders. During that period, the Court held that the writ could be used to address four kinds of challenges: (1) claims that a person alleged to be an alien was in fact a citizen (and therefore was not subject to INS jurisdiction at all); (2) claims that the alien had been deprived of a fundamentally fair administrative proceeding; (3) claims that the ad-

ministrative officer's finding of deportability was completely without supporting evidence; and (4) claims that the alien's case did not fall within one of the statutory categories providing for deportation. See *Tod* v. *Waldman*, 266 U.S. 113, 118 (1924); *Ng Fung Ho* v. *White*, 259 U.S. 276, 283-284 (1922); *Kwock Jan Fat* v. *White*, 253 U.S. 454, 458 (1920); *Gegiow* v. *Uhl*, 239 U.S. 3, 9 (1915); *Chin Yow* v. *United States*, 208 U.S. 8, 11-12 (1908). This case does not fall within any of those categories, for respondent concededly is a deportable alien and has made no claim that his deportation proceeding was lacking in due process.[14]

Section 1252, moreover, continues to allow judicial review for all the kinds of claims mentioned above. Although Section 1252(a)(2)(C) bars the courts from exercising jurisdiction over many claims raised by aliens who have been found removable because of aggravated felony convictions, it does not preclude the courts of appeals from examining, on petition for review, whether those conditions for preclusion of

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[14] During that period, this Court did consider the merits of two cases in which an alien proceeding by habeas corpus contended that the Attorney General had improperly denied discretionary relief from deportation even though the alien was statutorily eligible for such relief. See *Hintopoulos*, *supra*; *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954). In *Hintopoulos*, the Court denied relief, see 353 U.S. at 77-79, and in *Accardi*, the Court granted relief only because of what it found to be procedural irregularity in the handling of the case, see 347 U.S. at 266-268. The Court did not expressly address the scope of habeas corpus jurisdiction in either case, and it certainly did not suggest that the Constitution required that habeas corpus be available to review the particular nonconstitutional claims in those cases. The government also did not argue in either case that habeas corpus jurisdiction was absent. See Gov't Br. at 13, *Hintopoulos*, *supra* (No. 205); Gov't Br. at 14, *Accardi*, *supra* (No. 366). This Court has never considered itself bound by *sub silentio* assertions of jurisdiction. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1994); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 119 (1984).

review actually apply. Under well-settled principles governing preclusion-of-review provisions, when the availability of judicial review depends on a particular factual or legal conclusion, a court may determine whether that condition exists. The doctrine that a court has "jurisdiction to determine its jurisdiction," even when to do so requires it to render a decision that bears on the underlying merits, rests on that understanding. See *Land* v. *Dollar*, 330 U.S. 731, 739 (1947). Accordingly, a court of appeals presented with a petition for review by an alien found removable because of an aggravated felony conviction may determine (1) whether the person is an alien; (2) whether the alien is removable; and (3) whether that ground of removal is one which precludes judicial review under the statute. In addition, in light of this Court's jurisprudence directing that Acts of Congress should not be read to preclude review of constitutional claims absent a clear congressional expression to that effect, see *Webster* v. *Doe*, 486 U.S. 592, 603 (1988); *Johnson* v. *Robison*, 415 U.S. 361, 373-374 (1974), Section 1252(a)(2)(C) need not and should not be read to preclude review of substantial constitutional claims, such as constitutional challenge to the INA itself and claims of fundamental unfairness in a removal proceeding.

That review in the courts of appeals is an "adequate and effective" alternative to habeas corpus. See *Swain*, 430 U.S. at 381. The question of alienage is analogous to what the Court has referred to as "jurisdictional fact[s]" (including questions of alienage and citizenship). *Ng Fung Ho*, 259 U.S. at 284. The determination whether an alien is actually removable permits the courts of appeals to determine whether administrative officers acted within their legal authority in ordering the alien removed. See *ibid*; *Gegiow*, 239 U.S. at 5. And the inquiry whether an alien's removal proceedings comported with basic guarantees of constitutional due process satisfies the Court's admonition that an alien be per-

mitted to obtain judicial enforcement of the guarantee that "[t]he decision must be after a hearing in good faith, however summary." *Kwock Jan Fat*, 253 U.S. at 458.

Finally, even if this Court were to conclude that the Constitution does require a judicial forum for respondent's effort to obtain discretionary relief from removal, it would be far more appropriate to conclude that Section 1252(a)(2)(C) should not be applied to bar that claim in the court of appeals—either as a matter of statutory construction or one of constitutional imperative—than to hold that the district court may entertain that claim under its habeas corpus authority. Such a result would be much more consistent with Congress's unmistakable design in IIRIRA, which is to bar district court review of such removal orders completely, in light of the serious potential for delay of aliens' removal posed by district court proceedings, but to allow at least a very limited review of removal orders, even for aggravated felons, in the courts of appeals. Cf. *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-632 (1973) ("It is well established that our task in interpreting separate provisions of a single Act is to give the Act the most harmonious, comprehensive meaning possible in light of the legislative policy and purpose.") (internal quotation marks omitted).

Indeed, because Section 1252(a)(1) clearly directs that judicial review of removal orders be had, if anywhere, only in the courts of appeals, it is independently important to accomplishing Congress's purpose of expediting judicial review that all threshold questions concerning the availability of judicial review also be resolved in the courts of appeals, rather than in the district courts in the first instance subject to appeal to the courts of appeals. That conclusion comports with Section 1252(b)(9), which expressly provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory

provisions, arising from any action taken or proceeding brought to remove an alien from the United States under [the INA] shall be available only in judicial review of a final order under this section [1252]." Consistent with that provision, all quesitons concerning the "interpretation" and "application" of the Suspension Clause and Section 1252(a)(2)(C)'s preclusion of review "arising from" any proceeding to remove a criminal alien from the United States should be resolved "only in judicial review of a final order under [Section 1252]," rather than in the district court on habeas corpus, as occurred in this case. Under any permissible reading of the INA, therefore, the district court did not have jurisdiction over respondent's challenge.

II. THE ATTORNEY GENERAL MAY NOT GRANT RELIEF FROM DEPORTATION UNDER FORMER 8 U.S.C. 1182(c) TO ANY ALIEN PLACED IN REMOVAL PROCEEDINGS AFTER APRIL 1, 1997

If this Court nevertheless concludes that the district court properly exercised habeas corpus jurisdiction over respondent's challenge to his removal order, the question then arises whether the court of appeals erred in ruling that IIRIRA's repeal of Section 1182(c) is not to be applied in the case of an alien who, like respondent, pleaded guilty or nolo contendere to an offense before IIRIRA was enacted, even if that alien was placed in removal proceedings after the effective date of IIRIRA. As we now show, that ruling represents a manifestly erroneous application of the analysis in this Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). In *Landgraf*, the Court articulated a two-step analysis for determining whether a federal statute is to be applied to cases arising out of facts occurring before the enactment of legislation:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine

> whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the statue would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 280. Both steps of the *Landgraf* test require the conclusion that, because of IIRIRA's repeal of Section 1182(c), the Attorney General may not apply that provision in any removal proceeding commenced on or after April 1, 1997.

A. Congress Intended That Relief Under Former Section 1182(c) Not Be Available To Any Alien Placed In Removal Proceedings After April 1, 1997

1. Congress has clearly prescribed that former Section 1182(c) has no application in any removal proceeding commenced on or after April 1, 1997. In Title III-A of IIRIRA, Congress comprehensively revised the relevant provisions of the INA: it eliminated the INA's old "deportation" and "exclusion" proceedings; it created a new "removal" proceeding; it expressly repealed Section 1182(c), which was applicable in old deportation and exclusion proceedings; and it adopted instead a new form of discretionary relief (cancellation of removal) to be applied in new removal proceedings. See pp. 8-10, *supra*. All of those changes are plainly to be taken as a whole, for the new provisions are intended to be applied together. Congress's comprehensive establishment of a new immigration framework shows its intent that, after a transition period, the provisions of the old law should no

longer be applied at all. Cf. *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (a provision is repealed if "the later act covers the whole subject of the earlier one and is clearly intended as a substitute").

IIRIRA also established a single "title III-A" effective date for *all* the revisions made by Title III-A. Specifically, Section 309(a) of IIRIRA provides that, with limited exceptions not applicable to this case, Title III-A and the amendments made by that subtitle—which include IIRIRA Section 304's repeal of Section 1182(c)—"shall take effect" on the first day of the first month beginning more than 180 days after the enactment of IIRIRA, or April 1, 1997. See 110 Stat. 3009-625. IIRIRA's effective date thus marks a caesura, after which a new statutory framework is to be applied. The court of appeals' decision, however, creates a hybrid form of proceeding, in which aliens who are concededly properly placed in *removal* proceedings under the new statutory provisions enacted by IIRIRA Title III-A may nonetheless apply for relief from *deportation* under Section 1182(c), despite IIRIRA Section 304's explicit repeal of that form of relief. Congress simply did not fashion any such interweaving of old and new parts of the INA.

Any doubt about the temporal scope of IIRIRA Section 304's repeal of former Section 1182(c) is resolved by the saving provision in IIRIRA Section 309(c)(1), which provides:

> GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date—
>
> (A) the amendments made by this subtitle shall not apply, and

> (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

110 Stat. 3009-625, as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2(2), 110 Stat. 3657.[15] Congress thus focused its attention specifically on the question of which cases would be governed, even after the Title III-A effective date, by the provisions of the INA that were in effect prior to the enactment of IIRIRA. Congress answered that question by providing that, for aliens who were *already* in exclusion or deportation proceedings before that effective date, the amendments made by Title III-A (which include the repeal of Section 1182(c)) "shall not apply," and that such proceedings "shall continue to be conducted without regard to such amendments."[16] The application of "normal rules of construction" of statutes (*Lindh* v. *Murphy*, 521 U.S. 320, 326 (1997)) compels the conclusion that Congress intended

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[15] A technical correction to IIRIRA in Public Law No. 104-302 amended IIRIRA Section 309(c)(1) to provide that the Title III-A amendments would not apply to aliens in administrative proceedings "before" the effective date, rather than aliens in proceedings "as of" the effective date (as IIRIRA had originally provided). The technical correction makes clear that the Title III-A amendments do not apply to aliens whose administrative proceedings were completed before April 1, 1997.

[16] In Section 309(c)(4)(A), Congress expressly provided that certain parts of Title III-A would apply even to administrative and judicial proceedings commenced before April 1, 1997, and in Section 309(c)(2) and (3), Congress authorized the Attorney General to elect to apply Title III-A to additional administrative proceedings. 110 Stat. 3009-626. Congress did not, however, provide anywhere that any parts of IIRIRA Title III-A would *not* apply to any proceedings commenced on or after the Title III-A effective date of April 1, 1997.

the Title III-A amendments, including the repeal of Section 1182(c), to control all other cases.[17]

2. In concluding that Congress had not manifested any intent about the temporal reach of IIRIRA's repeal of Section 1182(c), the court of appeals overlooked the comprehensive nature of the revisions to the INA made by Title III-A of IIRIRA. As Judge Walker observed (Pet. App. 37a), "the entirety of the new IIRIRA applies generally to [respondent]—indeed, if it did not, he would not be subject to removal at all." The Title III-A effective date therefore must be read as governing the entirety of those intertwined provisions, including Section 304's repeal of Section 1182(c).

The court of appeals also erred in ascribing significance to the fact that Congress expressly provided that amendments to the INA made by certain other sections of IIRIRA (principally in Title III-B) were to be applied to past conduct. See Pet. App. 17a-18a. The court concluded that, because Congress thus demonstrated that it "knew how to explicitly make an IIRIRA provision applicable to 'convictions and sentences entered before, on, or after the date of the enactment of the Act,'" the absence of such language in Section 309 indicated that Congress had no intent to do so for the amendments made by Title III-A. *Id.* at 18a (quoting

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[17] In *Landgraf*, the Court declined to ascribe significance to the fact that Congress has specifically provided that certain of the amendments made by the Civil Rights Act of 1991 would not apply to a very narrow set of pending and closed cases. See 511 U.S. at 258-261. The Court found those provisions to be of little weight because, among other things, they involved "comparatively minor and narrow provisions in a long and complex statute." *Id.* at 258. In IIRIRA, however, Congress plainly focused its attention on the issue of transitional cases and specifically identified the set of transitional cases in which the new rules would not apply. Section 309(c) is not a "minor and narrow provision," but rather the key section addressing transition rules for IIRIRA Title III-A.

IIRIRA § 321(b), 110 Stat. 3009-628, and IIRIRA § 322(c), 110 Stat. 3009-629).[18]

The temporal-scope provisions governing specific amendments made by Title III-B cast no doubt on the express terms of Section 309(a) and (c)(1) that specify the temporal applicability of the comprehensive amendments made to the INA by Title III-A. Title III-B addresses subjects that are entirely different from those treated in Title III-A.[19] Cf. *Martin* v. *Hadix*, 527 U.S. 343, 356 (1999) ("Because [the sections] address wholly distinct subject matters, the same negative inference does not arise from the silence of [one section].").

Title III-A, for which Congress provided a single express effective-date provision, restructured removal proceedings

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[18] The court of appeals did not, however, conclude that those other provisions of IIRIRA required the negative inference that Congress affirmatively intended that IIRIRA Section 304's repeal of former Section 1182(c) would *not* apply to aliens who had previously been convicted of criminal offenses. The court acknowledged, in fact, that those other provisions "cover distinct subject matters that are too dissimilar to the availability of discretionary relief to support a negative inference in favor of prospective application of IIRIRA § 304." Pet. App. 21a n.5. Rather, it concluded that the other temporal-scope provisions rendered Congress's intent about the temporal reach of IIRIRA Section 304 ambiguous or unclear. *Id.* at 21a n.5, 22a.

[19] The subtitles also have quite different provenances. The substance of Title III-A of IIRIRA was part of H.R. 2202, an immigration bill that passed the House of Representatives on March 21, 1996 (142 Cong. Rec. 5962). Title III-B of H.R. 2202 would have established new procedures for the removal of alien terrorists. See *id.* at 5341-5344; H.R. Rep. No. 469, Pt. 1, *supra*, at 50. Alien-terrorist removal provisions, however, were separately enacted into law in AEDPA. See 110 Stat. 1258-1268; H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. 115-116 (1996). Title III-B of IIRIRA as eventually enacted was derived in large part from a separate Senate bill, S. 1664, Part 5 of which dealt with criminal aliens. See S. Rep. No. 249, 104th Cong., 2d Sess. 17-18 (1996); H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 223-226 (1996).

into a streamlined process from commencement through the hearing on the merits, the grant or denial of cancellation of removal, the appeal to the BIA, judicial review, and ultimately to the physical removal of the alien from the United States. Title III-B, on the other hand, enacted miscellaneous minor amendments to the INA dealing mostly with criminal aliens: Section 321 amended the INA's definition of "aggravated felony" (110 Stat. 3009-627 to 3009-628); Section 322 amended the definitions of "conviction" and "term of imprisonment" (110 Stat. 3009-628 to 3009-629); and Section 324 amended the punishment for the crime of illegal reentry (110 Stat. 3009-629).[20] Title III-B has no general effective date, and so Congress addressed the temporal scope of those provisions individually. The manner in which it did so in no way detracts from the distinct and generally applicable effective date provisions governing Title III-A.

Because Congress's intent is clear that IIRIRA's repeal of Section 1182(c) made that form of relief unavailable in any removal proceeding commenced on or after April 1, 1997, the Court need proceed no further: If Congress has expressly prescribed a statute's temporal reach, "there is no need to resort to judicial default rules." *Landgraf*, 511 U.S. at 280.

B. The Inapplicability Of Section 1182(c) In Removal Proceedings Commenced On Or After April 1, 1997 Does Not Contravene Any Presumption Against Retroactivity

The court of appeals also erred in concluding under the second step of the *Landgraf* analysis that application of IIRIRA's repeal of Section 1182(c) to aliens who pleaded guilty before that repeal would contravene the presumption

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[20] IIRIRA Section 347, also cited by the court of appeals (Pet. App. 17a-18a), was enacted in yet another subtitle, Title III-C, and provides for the removal of aliens who have illegally voted. See 110 Stat. 3009-638 to 3009-639.

against retroactivity. That presumption is not implicated in a situation like this, where Congress has withdrawn from an official (the Attorney General) a discretionary power to grant future relief from the effect of a civil proceeding that regulates an alien's future status and conduct. Moreover, the court of appeals' focus on guilty pleas is particularly inappropriate because it is wholly unconnected to the text or structure of the INA.

1. a. This Court has made clear that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment," *Landgraf*, 511 U.S. at 269, and that, "[e]ven absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations," *id.* at 273. One such "unquestionably proper" application is when the statute regulates conduct in the future, even when that regulation is based on prior events. See *id.* at 293 n.3 (Scalia, J., concurring in the judgment) (noting that "the presumption against retroactivity is not violated by interpreting a statute to alter the future legal effect of past transactions").

Removal proceedings present a clear example of such a situation, for a new statute may be applied to make an alien deportable, or to eliminate his eligibility for relief from deportation, without contravening any presumption against retroactivity. This Court has long characterized deportation proceedings as inherently prospective, in that they concern the alien's right to remain in this country in the future. As the Court explained in *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984), "[t]he deportation hearing looks prospectively to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain." Similarly, in *AADC*, the Court emphasized that, "in all cases, deportation is necessary in order to bring to an end *an ongoing violation*

of United States law." 525 U.S. at 491; see also *Ng Fung Ho*, 259 U.S. at 280 ("Congress has power to order at any time the deportation of aliens whose presence in the country it deems hurtful.").

The inherently prospective nature of Congress's specification of the grounds on which an alien may be deported or denied relief from deportation is supported by the fact that such specifications are exercises of Congress's plenary power, rooted in the Nation's sovereignty, to determine which aliens are welcome here and which are not.[21] Aliens have no entitlement to remain in the United States beyond that specifically granted to them by Congress.[22] Accord-

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[21] See *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587 (1952) ("The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose."); see also *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972) ("Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.") (internal quotations omitted); *Carlson* v. *Landon*, 342 U.S. 524, 534 (1952) ("So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders."); *Bugajewitz* v. *Adams*, 228 U.S. 585, 591 (1913) ("[N]or is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want."); *Kaloudis*, 180 F.2d at 490 ("The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate.").

[22] That is not to say that Congress could not expressly provide that an alien had a right to remain here, such that a subsequent statute should not be construed to impair that right. For example, in *Chew Heong* v. *United States*, 112 U.S. 536 (1884), which the Court discussed in *Landgraf* (see 511 U.S. at 271-272), the Court ruled that a statute barring Chinese nationals from reentering the United States without a certificate prepared when they left this country should not be applied to a Chinese national who had left the United States before the act was passed. At that time, a

ingly, when Congress provides for the deportation of a particular class of aliens, it is, "in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their *continued presence* here would not make for the safety or welfare of society." *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924) (emphasis added).[23] The regulation of aliens' "continued presence" here does not contravene any presumption against retroactivity.

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treaty between the United States and China gave Chinese nationals "the right to go from and return to the United States at pleasure, without being subjected to regulations or conditions affecting the substance of that right." 112 U.S. at 539. Crucial to the Court's decision was the conclusion that application of the new statute to an alien who had previously left the country would retroactively impair the "rights previously vested" in him. See *id.* at 559. The unusual facts of *Chew Heong* have no application to this case, which involves the more typical situation of the removal of an alien who is unquestionably removable because of his conviction of an aggravated felony. The application of a new rule barring the Attorney General from granting discretionary relief from removal impairs no "rights previously vested," because no alien has a vested right to discretionary relief from removal.

[23] For the same reason, the court of appeals' concern (see Pet. App. 22a n.6) that IIRIRA's repeal of Section 1182(c) must be construed to avoid constitutional doubts is ill-founded. This Court has made clear on numerous occasions that Congress's power to alter the bases on which an alien may be deported is not constrained by the Constitution's limitations on retroactive lawmaking. See *Marcello* v. *Bonds*, 349 U.S. 302, 314 (1955) (upholding deportation under 1952 INA of alien convicted in 1938 of marijuana violation); *Galvan* v. *Press*, 347 U.S. 522, 530-531 (1954) (upholding application of 1950 statute requiring deportation of anyone who had ever been a member of the Communist Party after entering the United States to an alien who had been a Communist only before the statute's enactment); *Harisiades*, 342 U.S. at 593-596 (similarly upholding application of 1940 statute requiring deportation of any person who had been a member of the Communist Party, even in the past); *Mahler*, 264 U.S. at 34, 39 (upholding deportation under 1920 statute of alien convicted in 1918 under the Espionage Act).

b. IIRIRA's repeal of the Attorney General's authority to grant relief under Section 1182(c) may also be understood as the repeal of a provision that would authorize prospective relief, which also does not implicate the presumption against retroactivity. See *Landgraf*, 511 U.S. at 273-274; *Miller* v. *French*, 120 S. Ct. 2246, 2257 (2000). A grant of relief under former Section 1182(c), as well as a grant of cancellation of removal today, is in effect a determination by the Attorney General that a finding that the alien is removable should not be given future effect, in light of all the information available to the Attorney General at that particular time.[24] Such a determination must be made "at the time of the hearing." *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 464 (1921).

The Attorney General's decision to grant relief from deportation also is similar in character to the entry of an injunctive order prohibiting the INS from carrying out a finding of deportability. As such, Congress's curtailment of the Attorney General's authority to grant such relief resembles a statute curtailing a court's authority to grant prospective injunctive relief. This Court has made clear that such a statute must be applied to pending cases, even if the request for injunctive relief arises out of conduct in the past. See *Duplex*, 254 U.S. at 464; *American Steel Foundries* v. *Tri-City Cent. Trades Council*, 257 U.S. 184, 201 (1921). Just as a complainant in equity has "no vested right in [an

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[24] Although the determination of removability is usually made in the same proceeding as the decision whether an alien is entitled to discretionary relief (see *Foti*, 375 U.S. at 223-225), the two matters are logically separate, and as a matter of administrative practice, immigration judges and the BIA do not pretermit the question whether an alien is removable even when they are persuaded that the alien is entitled to discretionary relief from removal. See also 8 C.F.R. 240.12(a) (requiring that IJ's order include a finding whether the alien is inadmissible or deportable).

injunctive decree] while it was subject to [appellate] review," *ibid.*, so an alien in deportation or removal proceedings has no vested right in the continued availability of a form of discretionary relief that would prevent the INS from carrying out in the future a deportation order based on a finding of deportability.

2. More generally, IIRIRA's repeal of Section 1182(c) was not retroactive because it was directed at the Attorney General's power to grant an alien discretionary relief from deportation, and was not directed at the alien's underlying conduct that gave rise to his deportation in the first place or any supposed right of an alien to obtain or apply for discretionary relief. As we have noted, the Court has explained on several occasions that the Attorney General's grant of discretionary relief from deportation or removal is an act of grace accorded to his unfettered discretion. See pp. 27-28, *supra*. The language of Section 1182(c) confirms that understanding. Section 1182(c) provided that certain lawful permanent resident aliens "may be admitted in the discretion of the Attorney General" without regard to various provisions of Section 1182(a) that render an alien excludable and therefore require the Attorney General to deny admission to such an alien. See 8 U.S.C. 1182(a) (1994) (describing categories of aliens "who are ineligible to receive visas and who shall be excluded from admission into the United States"). In addition, Section 1182(c) denied the Attorney General the power to admit certain lawful permanent resident aliens—such as those excludable on grounds of security and terrorist activity, see 8 U.S.C. 1182(c) (first sentence) (1994) (referring to 8 U.S.C. 1182(a)(3) (1994)), and some or all aggravated felons, see 8 U.S.C. 1182(c) (third sentence) (1994) (before and after amendment by AEDPA § 440(d), 110 Stat. 1277).

The background and legislative history of Section 1182(c) similarly show that Congress fashioned that provision as a

grant of discretionary power, not a right to relief for the alien. The predecessor to Section 1182(c), the Seventh Proviso to Section 3 of the Immigration Act of 1917 (1917 Act), ch. 29, 39 Stat. 878, was enacted in response to this Court's decision in *Lapina* v. *Williams*, 232 U.S. 78 (1914), which held that a statutory ground for exclusion required denial of admission to an alien who was returning to a domicile in the United States after a trip abroad, even though he would not have been deportable had he not left the United States. In the 1917 Act, Congress provided that, notwithstanding mandatory grounds of exclusion, an alien returning to an unrelinquished domicile in the United States of seven years after a temporary absence "may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe." 39 Stat. 878; see 8 U.S.C. 136(p) (1925).[25] The Senate Report described the proviso's intent as the "humane" one to "permit the readmission to the United States (under proper safeguards) of aliens who have lived here for a long time and whose exclusion after a temporary absence would result in peculiar or unusual hardship." S. Rep. No. 352, 64th Cong., 1st Sess. 6 (1916).

When Congress comprehensively reexamined the Nation's immigration laws in the early 1950s, it concluded that the discretionary power under the Seventh Proviso had been abused, and that the authority to waive grounds of inadmissibility should be further restricted to cases involving lawful permanent resident aliens. See H.R. Rep. No. 1365, 82d Cong., 2d Sess. 51 (1952); S. Rep. No. 1515, 81st Cong., 2d Sess. 382-383 (1950). Noting that under then-current law the Attorney General was "empowered to waive the grounds of exclusion in the case of an alien returning under the specified circumstances even though the alien had

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[25] The Secretary of Labor's authority was transferred to the Attorney General in 1939. See Reorganization Plan No. V, 54 Stat. 1238.

never been lawfully admitted to the United States," the Senate Report concluded that "any discretionary authority to waive the grounds for exclusion should be carefully restricted to those cases where extenuating circumstances clearly require such action and that the discretionary authority should be surrounded with strict limitations." *Ibid.* Congress therefore enacted Section 1182(c) in substantially the form which it took for 30 years. Absent from the legislative history of Section 1182(c) or its predecessor is any indication that Congress intended therein to create a "right" in the alien to be considered for relief from deportation.

The fact that Section 1182(c) created a restricted power in the Attorney General rather than a right in the alien demonstrates that IIRIRA's repeal of Section 1182(c) was not retroactive under the Court's understanding of that concept in *Landgraf.* The Court there referred to Justice Story's definition of a "retrospective" law as one that "takes away or impairs vested rights * * * , imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." 511 U.S. at 269 (quoting *Society for the Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156)). Congress never granted aliens any "vested right" in the form of relief authorized under Section 1182(c), because that form of relief was discretionary. The repeal also did not impose a "new duty" on respondent to leave the United States, as respondent was deportable well before IIRIRA was enacted. And IIRIRA's repeal of Section 1182(c) also did not attach any new disablility "in respect to transactions or considerations already past," because, as we have explained, the grounds for removability and availability of discretionary relief set forth in the INA regulate the alien's *future* right to remain in the United States.

3. The court of appeals' retroactivity analysis is wrong for an additional reason: its determination that the applicability of IIRIRA's repeal of Section 1182(c) should turn on whether the alien had *pleaded guilty* before that Section's repeal has no connection whatever to the statute (either IIRIRA or the INA more generally). The court of appeals believed (Pet. App. 24a-26a) that applying the repeal to aliens who had pleaded guilty would have a "retroactive effect" because those aliens might have entered their guilty pleas in reliance on the state of the law at the time, which permitted them at least to be considered for relief under Section 1182(c); thus, it concluded, the repeal of Section 1182(c) unsettled their expectations that they might obtain such relief (*id.* at 27a-29a). But the presumption against retroactivity explicated in *Landgraf* does not direct or authorize the courts to range at large to determine whether past expectations of some kind might be adversely affected by the application of a new law. Rather, since retroactivity is fundamentally a matter of statutory construction,[26] the pertinent question is whether the past consequence of some primary activity directly regulated by the statute is so adversely changed that it is appropriate to presume that Congress would not have intended that the new law apply. Thus, for example, in *Landgraf*, the Court concluded that provisions enacted in the Civil Rights Act of 1991 permitting a complaining party to obtain compensatory and punitive damages for acts of employment discrimination were retroactive because they increased employers' potential liability for discriminatory acts, the precise conduct addressed by

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[26] Cf. *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 858 n.3 (1990) (Scalia, J., concurring) (noting that "[t]he application of the presumption, like the presumption itself, seeks to ascertain the probable legislative intent").

both the original (1964) and amended (1991) versions of the Civil Rights Act. 511 U.S. at 281-283.

It does not follow that a particular application of a new statute has retroactive effect within the meaning of this Court's cases merely because its operation entails an adverse consequence as a result of some past activity, when that activity is not itself the basis of regulation under the statute. Thus, the court of appeals erred in concluding that the repeal of Section 1182(c) would be "retroactive" as applied to respondent's entry of his guilty plea, because guilty pleas as such are not the basis of anyone's removal under the INA. The INA does provide in many circumstances that an alien will be deportable if he is *convicted* of an offense, see 8 U.S.C. 1227(a)(2) (Supp. V 1999), and in fewer circumstances that an alien will be removable if he has *committed* an offense (whether or not convicted), see 8 U.S.C. 1227(a)(4)(A) (Supp. V 1999), but it makes no distinctions at all based on whether an alien has pleaded guilty or not guilty. There is therefore no basis in the statute for distinguishing, as the court of appeals did, between aliens who pleaded guilty and those who did not, in determining whether the repeal of Section 1182(c) would contravene the presumption against retroactivity. See Pet. App. 25a-26a, 31a.[27]

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[27] The court of appeals' focus on guilty pleas suggests that, notwithstanding its assertion that its ruling was based on the statute and not the Constitution (see Pet. App. 22a n.6), the court in effect concluded that IIRIRA's repeal of Section 1182(c) would be unconstitutional as applied to aliens who, like respondent, had previously pleaded guilty (but not aliens who had been convicted after a trial). But as we have noted, such a ruling would run counter to decades of decisions of this Court concluding that Congress may apply new statutory grounds for deportation based on past conduct without running afoul of constitutional constraints. See p. 41 n.23, *supra*; see also *Brady* v. *United States*, 397 U.S. 742, 756-757

4. Finally, even if it were not sufficiently clear under the first and second steps of the *Landgraf* analysis that Congress had intended that Section 1182(c) be inapplicable in any new removal proceeding commenced under IIRIRA, the courts should defer to the BIA's construction of IIRIRA's provision repealing Section 1182(c). If Congress has left a gap in IIRIRA's revision of the INA, then under standard principles of administrative law, that gap is for the Attorney General (or here, his delegate, the BIA) to fill, and the courts may not set aside his determination unless it is arbitrary, capricious, or contrary to law. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).

Deference is particularly appropriate to the Attorney General's interpretation of IIRIRA in light of his particular statutory charge in 8 U.S.C. 1103(a)(1) (Supp. V 1999) to issue controlling determinations of "all questions of law" arising in the administration of the immigration laws. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). It is also supported by weighty considerations of administrative practicality. Immigration judges and the BIA should not be required to follow two sets of rules in removal proceedings involving aliens who entered guilty pleas before IIRIRA—one set derived from the Attorney General's unquestioned authority to place an alien such as respondent in removal proceedings (rather than deportation proceedings), and another derived from the continued operation of a form of relief (Section 1182(c)) that applies only to deportation (but not removal) proceedings.

Adherence here to the rule of deference to the Attorney General's reasonable construction of a provision of the INA that he administers does not conflict with the presumption against retroactivity articulated in the second step of the

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(1970) (discussed at Gov't Reply Br. in Support of Pet. for Cert. at 9-10 n.8).

Landgraf analysis, even though both principles apply when Congress's intent about the temporal applicability of a federal statute is not clear. The provisions of the Civil Rights Act of 1991 that this Court concluded in *Landgraf* should not be applied retroactively were amendments to the Civil Rights Act of 1964 authorizing damages in civil actions. Those damages provisions are administered by the courts, not a federal agency, and so the courts did not owe deference to the agency's construction of those provisions. Cf. *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 650 (1990).

Landgraf did not address the circumstance in which a federal agency must ascertain the scope of its authority to administer a provision as affected by a new law enacted by Congress. That determination is very similar to the function frequently undertaken by federal agencies when they must determine the subject-matter scope of their jurisdiction. The courts defer to agencies' reasonable construction of their subject-matter jurisdiction or limits on their authority. See *CFTC* v. *Schor*, 478 U.S. 833, 844-845 (1986); see also *Mississippi Power & Light Co.* v. *Moore*, 487 U.S. 354, 380-382 (1988) (Scalia, J., concurring in the judgment) (collecting cases). In similar fashion, the courts should defer to the Attorney General's reasonable conclusion that he does not have authority to apply Section 1182(c) in removal proceedings commenced after April 1, 1997.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 2001